



COUNTY OF LOS ANGELES  
Internal Services Department  
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Dave Lambertson  
Director

*To enrich lives through effective and caring service.*

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June 1, 2006

To: Each Supervisor

From: Dave Lambertson  
Director

Subject: **UPDATE ON BUSINESS MACHINES MAINTENANCE SERVICES AGREEMENT**

On March 7, 2006, your Board approved award of 17 business machine maintenance services agreements for large photocopy machines, mainframe computers, servers and other major equipment items and delegated authority to the Director of the Internal Services Department to execute the agreements. The Board letter indicated that eleven of the agreements had been approved as to form by County Counsel and there were six in the final review process. This is to provide an update on the results of that process.

In concert with County Counsel, we have completed the agreement review process. There were no changes for five of the contracts. The one remaining vendor, EMC, has taken additional exceptions to some of the County's standard contract language. Their revised contract language has been reviewed by County Counsel and the Chief Administrative Office's Risk Management staff. The revisions include relatively minor changes to contract clauses "Consideration of Hiring County Employees Targeted for Layoff/Reemployment List", "Consideration of Hiring Gain/Grow Program Participants", "Record Retention and Inspection/Audit Settlement", as well as some changes to "Liquidated Damages", "Limitations of Liability" and "Intellectual Property Indemnification". The contract clauses and revisions are detailed on the attachment. We believe the proposed revisions represent manageable risk exposure to the County as services are only provided to perform preventative maintenance or to repair a piece of equipment if it breaks down. The annual value of the contract is approximately \$102,000.

We plan to incorporate the changes in the agreement with EMC within two weeks. If you have any questions, please call me or have your staff contact Kathy Hanks, Division Manager, Contracting Division, at (323) 267-3101.

DL:kh  
Attachment

c: Executive Officer, Board of Supervisors  
Chief Administrative Office  
County Counsel



## BUSINESS MACHINE MAINTENACE SERVICES AGREEMENT

COUNTY STANDARD LANGUAGE	EMC'S BEST & FINAL POSITION	IMPACT OF EMC'S BESTAND FINAL POSITION
<p><b>Consideration of Hiring County Employees Targeted for Layoff/or Re-employment List</b></p> <p>Should the Contractor require additional or replacement personnel after the effective date of this Contract to perform the services set forth herein, the Contractor shall give first consideration for such employment openings to qualified, permanent County employees who are targeted for layoff or qualified, former County employees who are on a re-employment list during the life of this Contract.</p>	<p><b>Consideration of Hiring County Employees Targeted for Layoff/or Re-employment List</b></p> <p>Should the Contractor require additional or replacement personnel after the effective date of this Contract to perform the services set forth herein, the Contractor shall give first consideration for such employment openings to qualified, permanent County employees who are targeted for layoff or qualified, former County employees who are on a re-employment list during the life of this Contract.</p>	<p>Relatively minor wording changes. In addition, there is little likelihood that, given the proprietary nature of the equipment and related services, there would be any County employees qualified to perform the services for which we are contracting.</p>
<p><b>Consideration of Hiring Gain/Grow Program Participants</b></p> <p>Should the Contractor require additional or replacement personnel after the effective date of this Contract, the Contractor shall give consideration for any such employment openings to participants in the County's Department of Public Social Services Greater Avenues for Independence (GAIN) Program or General Relief Opportunity for Work (GROW) Program who meet the Contractor's minimum qualifications for the open position. For this purpose, consideration shall mean that the Contractor will interview qualified candidates. The County will refer GAIN/GROW participants by job category</p>	<p><b>Consideration of Hiring Gain/Grow Program Participants</b></p> <p>Should the Contractor require additional or replacement personnel after the effective date of this Contract, the Contractor shall give consideration for any such employment openings to <i>qualified</i> participants in the County's Department of Public Social Services Greater Avenues for Independence (GAIN) Program or General Relief Opportunity for Work (GROW) Program who meet the Contractor's minimum qualifications for the open position. <del>For this purpose, consideration shall mean that the Contractor will interview qualified candidates.</del> The County will refer GAIN/GROW participants by job category</p>	<p>Relatively minor wording changes. In addition, there is little likelihood that, given the proprietary nature of the equipment and related services, there would be any participants qualified to perform the services for which we are contracting.</p>

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<p>to the Contractor.</p> <p>In the event that both laid-off County employees and GAIN/GROW participants are available for hiring, County employees shall be given first priority.</p>	<p>to the Contractor.</p> <p>In the event that both <i>qualified</i> laid-off County employees and <i>qualified</i> GAIN/GROW participants are available for hiring, County employees shall be given first priority.</p>	
<p><b>Liquidated Damages</b></p> <p>8.25.1 If,...</p> <p>(c) Upon giving five (5) days notice to the Contractor for failure to correct the deficiencies, the County may correct any and all deficiencies and the total costs incurred by the County for completion of the work by an alternate source, whether it be County forces or separate private contractor, will be deducted and forfeited from the payment to the Contractor from the County, as determined by the County.</p>	<p><b>Liquidated Damages</b></p> <p>8.25.1 If,...</p> <p>(c) <del>Upon giving five (5) days notice to the</del> If Contractor for failure <i>fails</i> to correct the deficiencies <i>within the time frame specified in this Subparagraph 8.25.2</i>, the County may correct any and all deficiencies and <i>the Contractor shall be liable for</i> the total costs incurred by the County for completion of the work by an alternate source, whether it be County forces or separate private contractor, <i>up to a maximum of two times the total monthly billing period charges for all covered Equipment and Software for the month the deficiencies occurred. Said costs shall</i> will be deducted and forfeited from the payment to the Contractor from the County, as determined by the County.</p>	<p>This is only applicable if the Contactor has deficiencies in performance that are not corrected in a specific length of time. If the County decides to fix the deficiencies, then the Contractor is liable for the cost of the fixes, up to two times the monthly charges (i.e., rather than an unlimited amount).</p>



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<p><b>Record Retention and Inspection/Audit Settlement</b></p> <p>The Contractor shall maintain accurate and complete financial records of its activities and operations relating to this Contract in accordance with generally accepted accounting principles. The Contractor shall also maintain accurate and complete employment and other records relating to its performance of this Contract. The Contractor agrees that the County, or its authorized representatives, shall have access to and the right to examine, audit, excerpt, copy, or transcribe any pertinent transaction, activity, or record relating to this Contract. All such material, including, but not limited to, all financial records, bank statements, cancelled checks or other proof of payment, timecards, sign-in/sign-out sheets and other time and employment records, and proprietary data and information, shall be kept and maintained by the Contractor and shall be made available to the County during the term of this Contract and for a period of five (5) years thereafter unless the County's written permission is given to dispose of any such material prior to such time.</p>	<p><b>Record Retention and Inspection/Audit Settlement</b></p> <p>The Contractor shall maintain accurate and complete financial records of its <i>maintenance</i> activities and operations relating to this Contract in accordance with generally accepted accounting principles. The Contractor shall also maintain accurate and complete employment and other records relating to its performance of this Contract. The Contractor agrees that the County, or its authorized representatives, <i>upon reasonable prior written notice</i> shall have access to and the right to examine, audit, excerpt, copy, or transcribe any pertinent transaction, activity, or record relating to this Contract. All such material, including, but not limited to, all financial records, <del>bank statements, cancelled checks or other proof of payment,</del> timecards, <del>sign-in/sign-out sheets</del> and other time and employment records, and <i>may be</i> proprietary data and information, <i>and</i> shall be kept and maintained by the Contractor and shall be made available to the County during the term of this Contract and for a period of five (5) years thereafter unless the County's written permission is given to dispose of any such material prior to such time.</p>	<p>This contract is for annual maintenance services which are priced on a monthly subscription fee basis for equipment that is on the contract's pricing schedule. It is unlikely the County would audit the Contractor's records but this contract clause, even with EMC's changes, still gives the County the right to do so.</p>

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<p><b>Record Retention and Inspection/Audit Settlement (con't)</b></p> <p>All such material shall be maintained by the Contractor at a location in Los Angeles County, provided that if any such material is located outside Los Angeles County, then, at the County's option, the Contractor shall pay the County for travel, per diem, and other costs incurred by the County to examine, audit, excerpt, copy, or transcribe such material at such other location.</p> <p>8.37.3 If, at any time during the term of this Contract or within five (5) years after the expiration or termination of this Contract, representatives of the County conduct an audit of the Contractor regarding the work performed under this Contract, and if such audit finds that the County's dollar liability for any such work is less than payments made by the County to the Contractor, then the difference shall be either: a) repaid by the Contractor to the County by cash payment upon demand or b) at the sole option of the County's Auditor-Controller, deducted from any amounts due to the Contractor from the County, whether under this Contract or otherwise.</p>	<p><b>Record Retention and Inspection/Audit Settlement (con't)</b></p> <p>All such material shall be maintained by the Contractor at a location in Los Angeles County, provided that if any such material is located outside Los Angeles County, then, at the County's option, the Contractor shall pay the County for travel, per diem, and other costs incurred by the County to examine, audit, excerpt, copy, or transcribe such material at such other location <i>or Contractor shall transport such materials.</i></p> <p>8.37.3 If, at any time during the term of this Contract or within five (5) years after the expiration or termination of this Contract, representatives of the County <i>may</i> conduct an audit of the Contractor regarding the work performed under this Contract, and if such audit finds that the County's dollar liability for any such work is less than payments made by the County to the Contractor, then the difference shall be <del>either: a) repaid by the Contractor to the County by cash payment upon written demand or b) at the sole option of the County's Auditor-Controller, deducted from any amounts due to the Contractor from the County, whether under this Contract or otherwise.</del></p>	<p>Merely indicates that the contractor has a right to transport materials and document requested for inspection. Also indicates that the any County demand to the Contractor for payments related to services not provided should be in writing.</p>



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County standard language contains no limits on liability	<p>Limitations of Liability</p> <p>Except as provided otherwise in Subparagraphs 8.49 and 8.51 herein, Contractor's total Liability and the County's sole and exclusive remedy for any claim of any type whatsoever, arising out of Services provided hereunder, shall be limited to direct damages caused by Contractor in an amount not to exceed the greater of US \$1,000,000 or the price paid by the County to Contractor for the specific service from which such claim arise. Except for a claim based on a violation of a party's intellectual property rights, neither party shall have liability to the other for any special, consequential, exemplary, incidental, or direct damages (including but not limited to, loss of profits, revenues, data and/or use) even if advised of the possibility thereof.</p>	<p>Rather than an unlimited liability, the contactors liability would be limited to the value of the contract or \$1 million. This is an equipment maintenance contract and there is relatively little risk associated with the services. As a note, the limitation does not apply to damages resulting from breach of Subparagraph 8.49 which is Warranty Against Contingent Fees, Warranty of Professional Skills and Performance, and the Warranty to Maintain Equipment within Specifications.</p>
<p><b>INTELLECTUAL PROPERTY INDEMNIFICATION</b></p> <p>Contractor shall indemnify, hold harmless and defend County, its Special Districts, elected and appointed officers, employees, and agents from and against any and all claims, demands, damages, liabilities, losses, costs and expenses, including, but not limited to, defense costs and legal, accounting and other expert, consulting or professional fees and attorney's fees, as such are incurred, for</p>	<p><b>INTELLECTUAL PROPERTY INDEMNIFICATION</b></p> <p>Contractor shall indemnify, hold harmless and defend County, its Special Districts, elected and appointed officers, employees, and agents from and against any and all <i>third party</i> claims, demands, <i>or suits and pay the resulting</i> damages, liabilities, losses, costs and expenses, including, but not limited to, defense costs and legal, accounting and other expert, consulting or professional fees and</p>	<p>Basically, the change substitutes the County's intellectual property indemnification language for the County's standard language. However, given that this is a relatively low dollar value equipment maintenance contract, it is unlikely that any such issue in this area should arise.</p>

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<p>or by reason of any actual or alleged infringement of any third party's patent or copyright, or any actual or alleged unauthorized trade secret disclosure or misappropriation, arising from or related to the tasks, deliverables, goods, Services or other work licensed or acquired hereunder or the operation and utilization of Contractor's work under this Contract. Any legal defense pursuant to Contractor's indemnification obligations under this Paragraph shall be conducted by Contractor and performed by counsel selected by Contractor and approved by County in writing. Notwithstanding the foregoing, County shall have the right to participate in any such defense at its sole cost and expense, except that in the event Contractor fails to provide County with a full and adequate defense, as required by law or this Contract, County shall be entitled to reimbursement for all such costs and expenses.</p>	<p>attorney's fees, as such are incurred, <i>awarded against County by a court of competent jurisdiction or settlement</i>, for or by reason of any actual or alleged infringement of any third party's <i>US</i> patent or copyright, <del>or any actual or alleged unauthorized trade secret disclosure or misappropriation, arising from or related to the tasks, deliverables, goods, Services or other work licensed or acquired</del> <i>products provided</i> hereunder or the operation and utilization of Contractor's work under this Contract <i>provided County (i) notifies Contractor promptly in writing of such claim, (ii) grants Contractor sole control over the defense and settlement thereof, and (iii) reasonably cooperates in response to a Contractor request for assistance.</i> <del>Any legal defense pursuant to Contractor's indemnification obligations under this Paragraph shall be conducted by Contractor and performed by counsel selected by Contractor and approved by County in writing.</del> Notwithstanding the foregoing, County shall have the right to participate in any such defense at its sole cost and expense, except that in the event Contractor fails to provide County with a full and adequate defense, as required by law or this Contract, County shall be entitled to reimbursement for all <i>defense</i> costs and expenses <i>actually incurred.</i> <i>Should any such product or Service become, or in Contractor's opinion be</i></p>	



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	<p><i>likely to become the subject of such a claim, Contractor shall, at its option and expense, (a) procure for County, the right or make continued use thereof, (b) replace or modify such so that it becomes non-infringing, or (c) request return of the product and, upon receipt thereof, refund the price paid by County, or discontinue the Service and refund the portion of any pre-paid Service fee that corresponds to the period of Service discontinuation. Contractor shall have no liability if the alleged infringement is based on (1) combination with non-Contractor products without Contractor's approval thereof, (2) use for a purpose or in a manner for which the product or Service was not designed without Contractor's approval thereof, (3) use of any older version of the Software when use of a newer Software release would have avoided the infringement, (4) any modification not made with Contractor's written approval, (5) any modifications made by Contractor pursuant to County's specific instructions without Contractor's approval thereof, or (6) any intellectual property right owned or licensed by County. This Subparagraph states the County's sole and exclusive remedy and Contractor's entire liability for infringement claims.</i></p>	